No. 04-81

FEB 9 - 2005
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In The
Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENT FARMERS' SUPPLEMENTAL BRIEF OPPOSING PETITIONER BASF'S FEBRUARY 3, 2005 SUPPLEMENTAL BRIEF WHICH PRETENDS JURY'S 2001 *"FRAUD[ULENT] MARKETING"* VERDICT NEVER OCCURRED, IGNORES EPA'S EDICT THAT BASF'S *"MARKETING"* SCHEME IS NOT PREEMPTED, CHALLENGES ESTABLISHED FACTS, AND *MISREPRESENTS THE RECORD*

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TABLE OF CONTENTS

		Page
I.	SUMMARY ARGUMENT	1
II.	STATUS OF BASF'S JULY 16, 2004 PETITION	2
III.	BASF'S MISINFORMATION CAMPAIGN	2
	A. BASF Pretends Jury Verdict And Seven Years Of Litigation Never Occurred	2
	B. BASF Pretends EPA Never Pronounced BASF's "Marketing" Scheme Is Not Preempted	3
	C. BASF's Recalcitrant Attempt To Challenge Established Facts	4
	D. BASF's Reprehensible Fabrication Of The Record	4
	E. BASF Misrepresents Minnesota Supreme Court Decision	6
IV.	EPA ACKNOWLEDGED DURING *BATES* JANUARY 10TH ORAL ARGUMENT THAT FRAUDULENT MARKETING REPRESENTATIONS ARE NOT PREEMPTED	6
	A. *Bates* Has No Bearing On Farmers' "Fraudulent Marketing" Claims Which Involved "Lies" To Farmers And State Regulatory Authorities And Consideration Of The "Risk" Of Farmers Discovering The Truth	6
	B. EPA Acknowledged Fraudulent Marketing Representations Are Not Preempted	8
V.	THIS COURT SHOULD DENY BASF'S INJUDICIOUS PETITION	8

TABLE OF AUTHORITIES

Page

CASES

Bates v. Dow Agrosciences LLC (No. 03-388) 6

Graver Mfg. v. Linde Co., 336 U.S. 271 (1940) 4

Hernandez v. New York, 500 U.S. 352 (1991) 4

Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2004) (*Peterson III*) 3, 4, 5, 6, 7

Peterson v. BASF Corp., 657 N.W.2d 853 (Minn. App. 2003) (*Peterson II*) 3, 4, 7

Peterson v. BASF Corp., 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*) 5

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 6

STATUTES, RULES AND REGULATIONS

40 C.F.R. § 152.113 5

40 C.F.R. § 152.113(b) 5

40 C.F.R. § 152.130(b) 5

Supreme Court Rule 15.8 1

Supreme Court Rule 18.10 2

I. SUMMARY ARGUMENT

Respondents (Farmers) respectfully submit this supplemental brief opposing Petitioner's (BASF) Supplemental Brief (Supp. Br.) filed February 3, 2005. BASF pretends the unanimous jury "***fraud[ulent] marketing***" verdict and unanimous Minnesota appellate rulings affirming that verdict never occurred. BASF pretends the Environmental Protection Agency (EPA) never pronounced that BASF's fraudulent marketing scheme is not preempted – a "***company marketing decision in which EPA has no input.***"

BASF challenges established facts and fabricates an accusation – with no record support – that Farmers claimed that the federal registration of Poast Plus herbicide somehow "imposed a duty on BASF to sell Poast Plus to minor crop farmers." BASF Supp. Br., p. 6. Nothing is further from the truth. Farmers argued, and the unanimous jury on December 6, 2001 found, that BASF violated its duty of honesty in the marketing of its herbicide. Nothing about the jury verdict requires BASF to do anything other than ***honestly market its product***.

The EPA through the Solicitor General, United States, acknowledged during January 10th oral argument in *Bates v. Dow Agrosciences LLC* (No. 03-388) (*Bates*), that fraudulent marketing representations are not preempted. This Court should deny BASF's petition and end BASF's misinformation campaign. BASF's supplemental brief and *Bates* oral argument are "intervening matter[s]" satisfying Supreme Court Rule 15.8 criteria for this supplemental brief.

II. STATUS OF BASF'S JULY 16, 2004 PETITION

BASF's petition for a writ of certiorari was filed July 16, 2004 and submitted for Conference of October 29, 2004. On January 4, 2005, Farmers filed a "*Supplemental Brief Addressing [BASF's] Amicus Brief In Bates v. Dow Agrosciences (No. 03-388) Improperly Arguing Merits Of [BASF's] Petition For A Writ In BASF v. Peterson (No. 04-81) Without Notifying Farmers' Counsel And Incredulously Complaining That Peterson Jury's 'Fraudulent Marketing' Verdict Requires BASF To Change Product Labels*" (Supp. Br.). Farmers correctly informed this Court that BASF's *Bates* brief, never served on Farmers' counsel, "egregiously misstates the facts and legal issues in BASF's pending petition for a writ of certiorari in *Peterson*." Farmers' Supp. Br., p. 1. BASF's *Bates* brief was an "intervening matter" satisfying Rule 15.8 criteria for Farmers' January 4th supplemental brief.[1]

III. BASF'S MISINFORMATION CAMPAIGN

A. BASF Pretends Jury Verdict And Seven Years Of Litigation Never Occurred

BASF grasps at an isolated and out-of-context citation to a complaint drafted in 1997 and a few statements from a five-week trial in 2001. This case was tried to a 12-member jury for five-weeks in November and December, 2001, with a unanimous finding that BASF engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or

[1] Farmers January 4th supplemental brief inadvertently referenced Supreme Court Rule 18.10 as authority for the submission.

concealment of the truth" as part of its marketing scheme. RFA 1-3 (Dec. 6, 2001 Special Verdict) (emphasis added); Clerk Doc. 575.[2] The Minnesota Supreme Court observed there was evidence before the jury of BASF's ***"material [marketing] misrepresentations"*** and ***"less than candid responses"*** regarding the registration status of its products. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 63-64 (Minn. 2004) (*Peterson III*) (emphasis added); *see also Peterson v. BASF Corp.*, 657 N.W.2d 853, 866 (Minn. App. 2003) (*Peterson II*) ("jury could conclude that BASF's ***marketing scheme*** and exploitation of federal regulations . . . concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the [New Jersey Consumer Fraud Act]") (emphasis added).

B. BASF Pretends EPA Never Pronounced BASF's "Marketing" Scheme Is Not Preempted

The Minnesota Supreme Court acknowledged the EPA's edict in this case that the EPA does not regulate company "marketing" of a herbicide – ***"a company marketing decision in which the EPA had no input."*** *Peterson III*, 675 N.W.2d at 70 (emphasis added); PX82; PX334 (***"it is related to a marketing strategy and is not a regulatory matter"***) (emphasis added).[3] There is

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[2] Attached to this supplemental brief is Respondent Farmers' Appendix (RFA).

[3] PX82 is Plaintiffs' (Farmers) Trial Exhibit 82 presented to the jury (letter from EPA responding to North Dakota Department of Agriculture inquiry). PX334 is Farmers' Trial Exhibit 334 (confidential internal BASF memorandum to BASF management stating that EPA was upset that BASF had deceived the North Dakota Pesticide Control Board).

absolutely no authority supporting BASF's disregard of the EPA's own statements in this case, or its claim that Farmers' "fraudulent marketing" claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

C. BASF's Recalcitrant Attempt To Challenge Established Facts

Although BASF attempts to re-litigate before this Court the facts presented in the five-week trial, affirmed by unanimous Minnesota *Peterson II* and *III* appellate courts on review, BASF cannot challenge established facts. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to the state-court factual findings"); *Graver Mfg. v. Linde Co.*, 336 U.S. 271, 275 (1940) ("[this Court] cannot . . . review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

D. BASF's Reprehensible Fabrication Of The Record

BASF complains – ***without record citation*** – that Farmers claim that "the *federal registration* of Poast Plus for minor crops imposed a duty on BASF to sell Poast Plus to minor crop farmers." BASF Supp. Br., p. 6 (emphasis in original). BASF blatantly misrepresents the record. Farmers argued to the jury that BASF violated its ***duty of honesty*** in the marketing of its herbicide to its customers. *See Peterson III*, 675 N.W.2d at 70 ("fraudulent marketing"); RFA 1-3 (Dec. 6, 2001 Special Verdict) ("fraud[ulent] marketing"); [Farmers'] Brief In Opposition, Sept. 24, 2004, pp. 9-19 (Statement Of Facts).

The *Peterson* jury verdict does not prohibit companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or naming one product as different products for sale.[4] However, the jury verdict and unanimous Minnesota appellate rulings unequivocally recognize that a company cannot ***"fraudulent[ly] market"*** one product ***"for different uses at different prices through a 'system of deceit.'"*** *Peterson III*, 675 N.W.2d at 70 (emphasis added); *Peterson II*, 657 N.W.2d at 860 (emphasis added). Nothing about the jury verdict requires BASF to do anything other than ***honestly market its product***. BASF's fabricated accusation in its supplemental brief that Farmers claimed that the federal registration of Poast Plus "imposed a duty on BASF to sell Poast Plus to minor crop farmers" is reprehensible.[5]

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[4] As recognized in *Peterson v. BASF Corp.*, 618 N.W.2d 821, 824 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*), the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R. §§ 152.113 and 152.130(b) ("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e). The EPA does not ascertain the reasons why companies choose to split or subset label their pesticides, beyond a demonstration that a split or subset label *"would not significantly increase the risk of any unreasonable adverse effect on the environment"*. 40 C.F.R. § 152.113(b) (emphasis added). Simply stated, the ***EPA does not address company marketing and pricing practices***.

[5] BASF's Minnesota counsel, Faegre & Benson, LLP, was excoriated in 2004 by the Honorable David S. Doty, Judge, U.S. District Court, Minnesota, for a lack of candor in arguments to the court in another consumer fraud class action. *In re Lutheran Brotherhood Variable Life Insurance Products Co. Sales Practices Litigation*, Civil No. 01-2433 (DSD) (SRN), slip op. at pp. 2-6 (January 7, 2004 D.Minn.) (noting that Chief U.S. District Court Judge Paul Magnuson had earlier expressed ***"quite clearly his concern over [Faegre & Benson's] professional conduct."***). *See* RFA 8, n. 2 (emphasis added).

E. BASF Misrepresents Minnesota Supreme Court Decision

BASF complains the decision of the Minnesota Supreme Court will expose the chemical industry to liability merely by following FIFRA labeling practices. BASF Supp. Br., pp. 7-8. Nothing is further from the truth. "BASF made material misrepresentations in advertisements . . . [and engaged in many other] . . . efforts to prevent farmers from learning that Poast Plus was approved for use on the same crops as Poast." *Peterson III*, 675 N.W.2d at 63-64. "BASF's . . . unconscionable conduct went beyond the label and the reach of federal law." 675 N.W.2d at 76. The Minnesota Supreme Court's holding fully accords with the teachings of this Court. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991) (FIFRA does not usurp historic State police powers to regulate pesticide sales).

IV. EPA ACKNOWLEDGED DURING *BATES* JANUARY 10TH ORAL ARGUMENT THAT FRAUDULENT MARKETING REPRESENTATIONS ARE NOT PREEMPTED

A. *Bates* Has No Bearing On Farmers' "Fraudulent Marketing" Claims Which Involved "Lies" To Farmers And State Regulatory Authorities And Consideration Of The "Risk" Of Farmers Discovering The Truth

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), phytotoxicity of the product (whether it harms the target crop, *e.g.*, *Bates*), or efficacy of the product (whether it kills target weeds). *Bates*, a crop injury case, has no bearing on Farmers'

fraudulent marketing claims. *See* Farmers' Jan. 4, 2004 Supp. Br., pp. 6-7 (*BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud*).

The Minnesota appellate courts in *Peterson II* and *III* emphasized evidence before the jury that BASF lied to state regulatory authorities, food processors, farmers and others to conceal a federal regulatory action, namely, the EPA registration of Poast Plus herbicide for the same crops as Poast, using the same safety data. *See, e.g.*, PX334 (EPA was "***not pleased***" that BASF "***misdirected***" state regulatory officials) (emphasis added); Tr. 458:1-23 (BASF executive Chris Coombs at trial admitted ***false statements*** to North Dakota Pesticide Control Board but said he was told to make the statements by BASF senior management); Tr. 1878:5-6;1559:16-251;1566:17-25;1567:1; 1681:17-25;1682:1-3 (North Dakota Agriculture Commissioner Sarah Vogel and Jack Peterson, former head of pesticide enforcement for North Dakota, bluntly and repeatedly testified at trial that BASF had lied to them: "***[I] can take hard answers, but don't lie. Just – you don't lie.***"). BASF threatened, encouraged and allowed the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." PX258;82;300. BASF's "confidential" internal memorandum described its marketing scheme as "***Opportunistic Exploitation***" of minor crop farmers. PX234 (emphasis added). BASF considered the "***risk***" of farmers discovering the truth, PX41 (emphasis added), and whether United States farmers could be "***controlled in future***" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered.

PX247 (emphasis added).[6] BASF's deceit is complete with its ***fabrication of the record*** in its supplemental brief to this Court.

B. EPA Acknowledged Fraudulent Marketing Representations Are Not Preempted

The EPA through the Solicitor General, United States, acknowledged during January 10th oral argument in *Bates* that fraudulent marketing representations are not preempted: "[W]e agree that . . . off-labeled, false misrepresentation[s] [are] . . . not preempted." Tr. 43:4-7 (question by Justice O'Connor and response by Lisa S. Blatt, Esq., Assistant to the Solicitor General).

V. THIS COURT SHOULD DENY BASF'S INJUDICIOUS PETITION

There is no basis to hold BASF's petition or remand the petition to the Minnesota Supreme Court. The EPA firmly declared to North Dakota regulatory officials upon inquiry that BASF's fraudulent "marketing" scheme was not in the EPA's purview and not preempted. The jury verdict and established facts, the Minnesota courts and common sense, unanimously declare likewise. Farmers

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[6] BASF, through a personal telephone call from Executive William Wisdom, *maliciously threatened to personally sue North Dakota Agriculture Commissioner Vogel* after North Dakota took steps to address BASF's fraud. Tr. 1758:15-1759:15.

ask this Court to promptly deny BASF's injudicious petition.

Respectfully submitted,

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February 9, 2005

APPENDIX TABLE OF CONTENTS

Page

December 6, 2001 Special Verdict Form ..... RFA 1

In re Lutheran Brotherhood Variable Life Insurance Products Co. Sales Practices Litigation, Civil No. 01-2433 (DSD)(SRN), slip op. (January 7, 2004 D.Minn.) ..... RFA 4

RFA 1

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT
CIVIL DIVISION

Ronald Peterson, Barry Thune, Owen Larson, Owen Larson Farms, Inc., Duane Evenson, Jeffrey Nesvig, Richard Moen, Christopher Grove, Christopher Grove Farms, Inc., David Abentroth, Glenn Asbeck, Asbeck Inc. Donald Steinbeisser, Joe G. Steinbeisser and Sonds, Inc., Stephen Pust, and Stephen Pust Farms, Inc., individually and on behalf of all others similarly situated,

Plaintiffs

v.

BASF Corporation, a foreign corporation,

Defendants.

SPECIAL VERDICT FORM

Court File No. C9-98-656

We the Jury, duly impaneled and sworn in the above-captioned matter, give the following answers to the following special verdict questions:

1. Did Defendant BASF Corporation, engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and

pricing strategies for Poast and Poast Plus herbicides?

Answer: X (YES) _____ (NO)

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus?

Answer: X (YES) _____ (NO)

If you answered "Yes" to either Questions 1 and/or 2 above, then answer Question 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

Answer: X (YES) _____ (NO)

If you answered Question 3 above "Yes" then go to Question 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

1992	$ 2,000,000
1993	$ 5,000,000
1994	$ 3,000,000
1995	$ 4,000,000
1996	$ 1,000,000

Dated this 6th day of December, 2001, at 1:47 pm o'clock ___.m. in the County of Norman, Ada, Minnesota.

/s/ Clarice Austinson
FOREPERSON

After six hours of deliberation, ten of the jurors may agree upon and return the special verdict form.

If only ten of twelve jurors concur, all concurring jurors must sign:

1. _____ 6. _____
2. _____ 7. _____
3. _____ 8. _____
4. _____ 9. _____
5. _____ 10. _____

This special verdict form was signed at _____ o'clock ___.m.

Dated: _____, 2001.

_____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 01-2433 (DSD/SRN)

Dean Thompson and Lolly Ann Thompson,

Plaintiffs,

v.

ORDER

Lutheran Brotherhood and Lutheran Brotherhood Variable Products Company,

Defendants.

Richard W. Bale, Esq., Marcus R. Sanborn, Esq. and Larson King, LLP, 30 East Seventh Street; Suite 2800, St. Paul, MN 55101; counsel for plaintiffs.

Edward T. Wahl, Esq., Michael F. Cockson, Esq. and Faegre Benson, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 and James F. Jorden, Esq., Jerome V. Bolkcom, Esq., 1025 Thomas Jefferson Street N.W., Suite 400E, Washington, D.C. 20007, counsel for defendants.

(Filed Jan. 8, 2004)

This matter is before the court upon defendants' objections to Magistrate Judge Susan R. Nelson's report and recommendation, dated October 23, 2003. In her report, the magistrate judge concluded that defendants' motion to dismiss should be denied. Defendants raise four grounds of objection to the report. The court addresses them in turn.

I. Footnote 12

Defendants object to Magistrate Judge Nelson's, observations in footnote 12 of her report and recommendation regarding the tactics employed by defendants' counsel in the presentation of the merits of defendants' motion to dismiss.[1] Magistrate Judge Nelson's concerns are best expressed in her own words, which are set forth below in relevant part:

> The Court expresses serious concern regarding an argument made in Defendant's brief [in support of its motion to dismiss]. In *In re Lutheran Bhd. Variable Ins. Prod. Co. Sales practices Litig.*, No. 99-1309, 2002 WL 1023150, at *3 (D. Minn. May 17, 2002) (Magnuson, J.), the Court held that fraudulent concealment would not toll the statute of limitations for the plaintiffs' statutory (CFA) fraud claims. Alternatively, *in dicta*, the Court noted that even if fraudulent concealment did toll the limitations period for CFA claims, "Plaintiffs have failed to show that they did not have a reasonable opportunity to discover the alleged fraud until their premiums did not vanish as promised." *Id.* In support of that *dicta*, the Court cited evidence submitted by the defendants (Wahl. Aff. Ex. 40 at 2) . . . that at least one of the plaintiffs, "Mr. Deon Thompson [not to be confused with Dean Thompson], received annual statements from Lutheran Brotherhood that told him as early as 1988 that his policy would terminate in 1993 if no further premiums were paid" and [that] "[t]hese statements should have

[1] Defendants are represented by the law firm of Faegre & Benson, LLP, through its partners Jerry W. Snider and Edward T. Wall, and associates Michael F. Cockson and Erik Girvan.

alerted Plaintiffs to the fact that the policies were not performing as Lutheran Brotherhood allegedly promised they would." *Id.*

Later . . . Lutheran Brotherhood relied on the Court's *dicta* in the May 17, 2002 Order to argue that the plaintiffs' common law fraud claim was also barred by the statute of limitations because the plaintiffs should have known of the existence of the claim. *Id.* at *9. The Court rejected this argument. . . . The Court explained that the evidence it relied on as the basis for its *dicta* in the May 17, 2002 Order, namely the evidence that Deon Thompson received a notice in 1988, was erroneous because that notice, which was submitted as evidence by Lutheran Brotherhood's attorneys, "related to a policy that is not at issue here." *Id.* The Court then admonished Lutheran Brotherhood:

> Lutheran Brotherhood should have brought that error to the Court's attention, but at the least, Lutheran Brotherhood should not now attempt to capitalize on that error by using the Court's mistaken assumption as support for the instant Motion. The Court reminds counsel for both parties of their duties as officers of the Court, and will not countenance misrepresentations of the facts or the law, whether intentional or inadvertent. *See Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 833 (8th Cir. 1992).

Id. at 10.

Remarkably, in this case, Lutheran Brotherhood, again, attempts to capitalize on the

> evidentiary error from the May 17, 2002 Order. In this case, Lutheran Brotherhood states that [c]ourts do not hesitate to dismiss claims where facts pleaded, or otherwise on the record, show that a party knew or should have known of the facts long enough before commencing their action that the action is time-barred." (Def.s' Reply Mem. in Supp. of Mot. to Dismiss, at 4). In support of that proposition, Lutheran Brotherhood leads with a citation to the May 17, 2002 Order: "*See In re Lutheran Bh'd*, 2002 WL 1023150, at *3 (plaintiffs had the opportunity, as a matter of law, to discover claims where the record showed that plaintiffs received statements that 'should have alerted Plaintiff[] to the fact that the policies were not performing as Lutheran Brotherhood allegedly promised they would')." (Def.s' Reply Mem. in Supp. of Mot. to Dismiss, at 4). The parenthetical explanation of the May 17, 2002 Order is not only patently erroneous as a matter of law but Lutheran Brotherhood, again, by seeking to do what Judge Magnuson admonished them not to do, seeks to capitalize on the "Court's mistaken assumption as support for" the Motion to Dismiss in this case. *Id.* *10.

(R&R at 16, n.12.)

In their objections to the report and recommendation, defendants contend that Magistrate Judge Nelson misunderstands the sequence of events. Defendants argue that, until the July order was issued, they believed that the dictum of the May order stood for the proposition that any statement revealing a fluctuation in interest rates, even one pertaining to a policy that was not the subject of a plaintiff's claim, was sufficient to place a particular plaintiff on notice that all his policies were not performing

as originally projected. Based on that interpretation of the dictum, defendants cited the May order to Magistrate Judge Nelson in their reply memorandum, filed May 13, 2003, and at argument on June 26, 2003. Defendants claim they had no reason to doubt the soundness of their argument until Judge Magnuson issued his July order, at which time the briefing and argument of defendants' motion to dismiss in this case had already been completed. Defendants therefore conclude that "the chronology of events demonstrates [their] good faith." (Defs.' Obj. at 2.)

Defendants' excuse is weak. Three months elapsed between Judge Magnuson's issuance of the July order and Magistrate Judge Nelson's issuance of her report and recommendation. During this time defendants remained silent and made no effort to inform Magistrate Judge Nelson that, Judge Magnuson's July order had undermined the validity of their reliance upon his May order. Therefore, even if Magistrate Judge Nelson mistakenly believed that defendants had read the July order when they made their arguments, defendants' subsequent failure of candor wholly justifies her admonishment of them.[2]

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[2] Judge Magnuson's July order expressed quite clearly his concern over counsel's professional conduct. Whether or not counsel believed the concern was justified, they should have taken prompt action to avoid allowing their arguments before Magistrate Judge Nelson to compound the problem. A letter to the court and plaintiffs' counsel of a single paragraph, stating that defendants would no longer rely on Judge Magnuson's May order as persuasive authority for their arguments, would have sufficed to lay the matter to rest. Counsel, however, chose not to take such action. Consequently they are in no position to complain about Magistrate Judge Nelson's comments.

Defendants are correct that they and their counsel may not be sanctioned inasmuch as neither Rule 11 of the Federal Rules of Civil Procedure or any of the Minnesota Rules of Professional Conduct explicitly imposes an ongoing duty to update briefs after they are filed with the court. *See* Minnesota Rules of Professional Conduct R. 3.3 & 4.1 (2002); *Samuels v. Wilder*, 906 F.2d 272, 274-75 (7th Cir. 1990). To say that counsel's silence is not punishable, however, is not to say that Magistrate Judge Nelson or any other judicial officer of this district should tolerate it or let it pass without comment. Magistrate Judge Nelson's observations in footnote 12 of the report and recommendation were an appropriate exercise of her authority to demand the highest standards of practice and candor among the members of the federal bar. If the litigation should reach a stage where counsel appear before this court, they will find its expectations no less stringent then those of Magistrate Judge Nelson. Defendants' request that footnote 12 be stricken is accordingly denied.

II. Adequacy of Pleading – Fraud and Fraudulent Concealment

Defendants object to the magistrate judge's conclusion that plaintiffs have adequately pleaded fraud and fraudulent concealment. Defendants' objection is based on a syllogism. For their major premise, they point out that plaintiffs allege that defendants discovered in 1987 that approximately one-third of its universal life policies would "self destruct." (Compl. ¶ 53.) Defendants' minor premise is that 1987 is later than 1985, the year when plaintiff Dean Thompson purchased one of defendants' policies. Defendants therefore conclude that plaintiffs' pleading is inadequate because defendants could not have, in 1985,

fraudulently concealed information they did not learn until 1987.

As plaintiffs point out, however, defendants ignore a myriad of other allegations in the complaint. For example, plaintiffs allege that, in approximately 1982, defendants adopted a business strategy that would allow them to capitalize on a surge in interest rates by enticing customers with projections that would be unsustainable over the long term. (*See* Compl. ¶ 26.) Plaintiffs allege that elements of the strategy included a change in the way defendants recognized contract loans, a change in the way defendants calculated dividend projections, defendants' introduction of, a new "universal life" insurance product, defendants' adoption of the vanishing premium concept, and defendants' liberalization of its rules against internal replacement of customers' policies. (Compl. ¶¶ 26-27.)

Plaintiffs further allege that, pursuant to their strategy, defendants failed to disclose the impact that increasing insurance costs and declining interest rates would have on their policies' performance. (Compl. ¶ 29.) Plaintiffs also allege that defendants employed a software program to generate misleading projections regarding their policies' performance and that defendants failed to disclose that the results generated by the software were based on assumptions that defendants knew were faulty. (Compl. ¶ 30.) It is clear from the context of preceding and following paragraphs that the allegations in, paragraphs 29 & 30 apply to a period of time beginning in approximately 1982.

In discussing the adequacy of plaintiffs' fraudulent concealment claim, the magistrate judge cited the allegations already discussed and others. (R&R at 14.) Considering all

the allegations of the complaint, the magistrate judge correctly held that plaintiffs adequately pleaded fraud and fraudulent concealment. Defendants, aside from their misguided syllogism, cite no authority to the contrary. Accordingly, the magistrate judge's conclusion is affirmed.

III. The 1994 Update – Fraudulent Concealment

Defendants also argue that plaintiffs may not rely on the doctrine of fraudulent concealment because plaintiffs should have become aware of their claims in 1994 when defendants sent them an update disclosing that their policies' cash value was less than, projected. The magistrate judge correctly determined that plaintiffs must establish that they were actually unaware of the facts on which their claims are based, a point which defendants concede. *See Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. Ct. App. 2003). Rather, defendants contend that the magistrate judge erred in determining which facts constitute the "defect" that is the basis for plaintiffs' claims. (*See* Defs.' Obj. at 7.)

Defendants argue that the "defect" which underlies plaintiffs' claims is the failure of the policies to perform as initially projected. Defendants contend that when plaintiffs "became alarmed" in 1994 about the performance of their policies, they had the information they needed to pursue their claims for relief. (Defs.' Obj. at 7-8.)

Defendants misapprehend the nature of the "defect" that gives rise to plaintiffs' claims. Plaintiffs' claims are not based upon the failure of their policies to perform well. There is no basis in law for a bare claim that performance of an investment did not meet initial expectations. Rather, as the magistrate judge aptly pointed out, the gravamen of

plaintiffs' claims is defendants' failure to disclose material information regarding the policies. (R&R at 14.) As the magistrate judge noted, the 1994 update did not impart the material information which defendants allegedly concealed from plaintiffs. The 1994 update only suggested that plaintiffs may be suffering injury.

Defendants cite *Veldhuizen v. A.O. Smith Corp.*, 839 F. Supp. 669 (D. Minn. 1993), for the proposition that plaintiffs' knowledge of their injury bars them from invoking fraudulent concealment. In *Veldhuizen*, the defendant induced the plaintiff, a farmer, to purchase certain grain silos by promising "better feed, improved herd health, increased milk production and lower costs." 839 F. Supp. at 671-72. Later, plaintiff observed that his cows produced more milk while eating bought feed as opposed to grain stored in defendant's silos. *Id.* at 673. Thereafter plaintiff consulted two veterinarians who identified the silos as the cause of the reduced milk production. *Id.* at 673. Plaintiff, however, did not credit the veterinarians' conclusion and consequently did not file suit against the defendant until more than ten years later. *Id.* at 673. Plaintiff argued that the doctrine of fraudulent concealment tolled the statute of limitations. *See id.* The court granted defendant's motion for summary judgment, holding "that regardless of any concealment the limitations period began to run, as a matter of law, in the late 1970s when [the veterinarians] attributed the cause of the problems experienced by the Veldhuizens to the Harvestore silos." 839 F. Supp. at 669.

Veldhuizen is inapposite to the present case. Veldhuizen discovered his injury when he noted that his herd's, milk production was suffering. It was not until Veldhuizen consulted the veterinarians, however, that he discovered the defendant's silos were the cause of his injury. The

court held that Veldhuizen's claim was barred as a matter of law not because he discovered his injury, but rather because Veldhuizen sat on his rights after two experts informed him that the defendant had caused his injury.

In this case, although plaintiffs discovered the fact of their injury in 1994, they did not then necessarily discover that the injury was caused by a fraud allegedly perpetrated by defendants. Investment performance, like milk production, is influenced by many factors. The ill news brought by the 1994 update did not, of itself, indicate wrongdoing on the part of the defendants. Whether the update obligated plaintiffs to investigate the matter more diligently than they did is, as rightly observed by the magistrate judge, a fact question not amenable to determination in the context of a motion to dismiss. *See Force v. ITT Hartford Life & Annuity Ins. Co.*, 4 F. Supp. 2d 843, 860 (D. Minn. 1998). In any event, the magistrate judge correctly held that the 1994 update does not necessarily foreclose application of the fraudulent concealment doctrine to plaintiffs' claims.

IV. Consumer Fraud Act and Deceptive Trade Practices Act claims Applicability of Fraudulent Concealment Doctrine

Finally, defendants object to the magistrate judge's conclusion that the doctrine of fraudulent concealment can apply to toll the statute of limitations with respect to plaintiffs' claims under the Prevention of Consumer Fraud Act ("CFA"), Minn. Stat. §§ 325F.68-325F.70, and the Uniform Deceptive Trade Practices Act ("DTPA"), Minn. Stat. §§ 325D.43-325D.48. In support of their objection, defendants cite Judge Magnuson's May order. *See In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*,

2002 WL 1023150, at *3 (D. Minn., May 17, 2002) ("It is not clear to this Court that the doctrine of fraudulent concealment is different than a discovery allowance, which both parties agree does not apply to CFA claims.")

Judge Magnuson's order notwithstanding, the magistrate judge correctly concluded that the doctrine of fraudulent concealment is distinguishable from the discovery rule under Minnesota law. *See Fabio v. Bellomo*, 504 N.W.2d 758, 764 n.2 (Minn. 1993) (discussing discovery rule and fraudulent concealment as independent doctrines); *Giles v. Sanford Mem'l Hosp. & Nursing Home*, 371 N.W.2d 635, 638 (Minn. Ct. App. 1985). The magistrate judge was also right to note that the Minnesota Court of Appeals has indicated in dicta that the doctrine of fraudulent concealment does indeed apply to DTPA claims. *See Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 892 (Minn. Ct. App. 1993). Further, the court agrees with the magistrate judge's conclusion that the doctrine of fraudulent concealment may toll the statute of limitations for CFA and DTPA claims.

Accordingly, after a de novo review of the file and record, **IT IS HEREBY ORDERED THAT**:

1. The report and recommendation of the magistrate judge [Docket No. 33] is adopted in its entirety.

2. Defendants' motion to dismiss [Docket No. 19] is denied.

3. Pursuant to the magistrate judge's order of December 16, 2003 [Docket No. 38], defendants shall have until ten days after the issuance of this order to answer or otherwise respond to plaintiffs' amended complaint.

Dated: January 7, 2004

/s/ David S. Doty
David S. Doty, Judge
United States District Court